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Public Prosecutor v Kao Che Jen

B HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KCH-41 AC-13/7 OF 2015
ALWI ABDUL WAHAB JC
8 DECEMBER 2015

C *Criminal Law — Criminal breach of trust — Ingredients of charge — Company director ('accused') requested debt owed to company to be paid to him personally so that money could be used for company's daily operations — Accused had sought company's external auditor's advice before requesting monies to be paid to him — Accused in dilemma as co-director refused to sign cheques to meet company's expenses — Evidence showed monies paid to accused used entirely for company's benefit — Whether prosecution failed to prove accused had dishonest intention to misappropriate monies for personal use — Whether adverse inference had to be invoked against prosecution for failing to call company's external auditor and accounts officer who knew of accused's plan from the outset — Evidence Act 1950 s 114(g)*

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The instant appeal was against the magistrate's court's decision to acquit and discharge the respondent without calling for his defence at the end of the prosecution's case on a charge of committing criminal breach of trust ('CBT') under s 409 of the Penal Code. The respondent was a director in a company called STM Transformers Sdn Bhd ('STM') and was in charge of managing its day-to-day operations. He was charged with committing CBT with regard to RM36,953.01 ('the debt') owed to STM by another company ('Wee Success') by getting the latter to pay that sum into his personal bank account. The prosecution submitted that the debt belonged to STM and whatever reason the respondent had for requesting the monies to be credited into his personal account was irrelevant as he had dishonest intention to misappropriate the money. At the trial, the director of Wee Success ('PW2') testified that the respondent asked for the debt to be paid into his account because he needed it to run STM's day-to-day operations because another director of STM, PW7, had refused to sign cheques. PW2 also said the debt was considered settled as STM never made any further claim after the payment was made to the respondent. Evidence was adduced at the trial that before he asked PW2 to issue a cheque for the debt in his name, the respondent had consulted STM's external auditor about the matter.

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Held, dismissing the appeal and affirming the magistrate's court's decision:

(1) The prosecution failed to establish that the respondent had dishonest intention to misappropriate the said money for his personal use. PW2 testified at the trial that the respondent had informed him of the reason for his request. STM's account officer, Madam Liew, and its external auditor were aware of the whole episode and they had been consulted and informed prior to the respondent making his request to PW2. The fraudulent intention was further thwarted with the production of defence exh D1 which clearly showed that the RM36,953.01 that had been credited into the respondent's account was properly recorded into STM's statement of account. Exhibit D1 also showed that there was no more pending payment due from Wee Success (see paras 14–16 & 21).

(2) During the prosecution's case, the defence had put to the prosecution's witnesses at the very first instance the roles of the other important witnesses, ie account officer, Madam Liew, who issued exh D1, and the external auditor, David Wong, from whom the respondent sought advice on how the payment from Wee Success could be used for the daily operation of STM. The court agreed with the magistrate that the prosecution's failure to call these two witnesses was fatal to its case. This was a proper case to invoke s 114(g) of the Evidence Act 1950 as the evidence, if produced, would have been unfavourable to the prosecution (see para 19).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan mahkamah majistret untuk membebaskan dan melepaskan responden tanpa memanggil responden untuk pembelaannya pada akhir kes pihak pendakwaan atas tuduhan melakukan pecah amanah ('pecah amanah') di bawah s 409 Kanun Keseksaan. Responden adalah pengarah syarikat yang dikenali sebagai STM Transformers Sdn Bhd ('STM') dan and bertanggungjawab menguruskan operasi harian. Responden dituduh melakukan pecah amanah berkenaan RM36,953.01 ('hutang') hutang kepada STM oleh syarikat lain ('Wee Success') dengan membuatkan Wee Succes membayar jumlah tersebut ke dalam akaun bank peribadinya. Pihak pendakwaan berhujah bahawa hutang dimiliki oleh STM dan apa-apa sebab responden memohon wang tersebut dikreditkan ke dalam akaun peribadinya adalah tidak relevan kerana dia mempunyai niat tidak jujur untuk menggelapkan duit tersebut. Semasa perbicaraan, pengarah Wee Success ('PW2') memberi keterangan bahawa responden meminta hutang dibayar ke dalam akaunya kerana dia perlunya untuk menjalankan operasi harian STM sebab pengarah STM lain, PW7, enggan menandatangani cek-cek. PW2 juga menyatakan hutang tersebut dipertimbangkan selesai kerana STM tidak pernah membuat tuntutan selanjutnya selepas bayaran dibuat kepada responden. Keterangan dikemukakan pada perbicaraan bahawa sebelum dia meminta PW2 mengeluarkan cek bagi hutang dalam namanya, responden telah berunding dengan juruaudit luar STM mengenai perkara tersebut.

Diputuskan, menolak rayuan dan mengesahkan keputusan mahkamah majistret:

(1) Pihak pendakwaan gagal untuk membuktikan bahawa responden mempunyai niat tidak jujur untuk menggelapkan wang tersebut bagi penggunaan peribadinya. PW2 memberi keterangan semasa perbicaraan bahawa responden telah memberitahunya mengenai alasan bagi permohonannya. Pegawai akaun STM, Puan Liew, dan juruaudit luarnya sedar mengenai keseluruhan episod dan mereka telah dirujuk dan diberitahu sebelum responden membuat permohonannya kepada PW2. Niat fraud selanjutnya digagalkan dengan pengemukakan pembelaan eksh 'D1' yang jelas menunjukkan bahawa RM36,953.01 telah dikreditkan ke dalam akaun responden direkodkan secara betul ke dalam penyataan akaun STM. Ekshibit D1 juga menunjukkan bahawa tidak terdapat bayaran yang belum selesai yang kena dibayar oleh Wee Success (lihat perenggan 14–16 & 21).

(2) Semasa kes pihak pendakwaan, pembelaan telah memberitahu saksi-saksi pihak pendakwaan pada mula-mula peranan saksi-saksi penting yang lain, iaitu pegawai akaun, Puan Liew, yang mengeluarkan eksh D1, dan juruaudit luar, David Wong, daripada mana responden mendapatkan nasihat bagaimana bayaran daripada Wee Success boleh digunakan bagi operasi harian STM. Mahkamah bersetuju dengan majistret bahawa kegagalan pihak pendakwaan untuk memanggil kedua-dua saksi ni adalah serius kepada kesnya. Ini adalah kes betul untuk membangkitkan s 114(g) Akta Keterangan 1950 kerana keterangan, jika dikemukakan, tidak akan memihak kepada pihak pendakwaan (lihat perenggan 19).]

Notes

For a case on ingredients of charge, see 4(1) *Mallal's Digest* (5th Ed, 2015) para 240.

Cases referred to

Nadarajan v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications [1994] 2 MLJ 657, HC (refd)
Hj Maamor bin Hj Abdul Manap v PP [2002] 6 MLJ 668, HC (refd)

Legislation referred to

Criminal Procedure Code s 422
Evidence Act s 114(g)
Penal Code s 409, 409B(1)(b)(i)

Mirza bt Mohamad (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Lim Heng Choo (Steven Sia with him) (Lim & Lim Advocates) for the respondant.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] This is an appeal by the prosecution ('the appellant') against the decision of the learned magistrate in acquitting and discharging the accused ('the respondent') at the end of the prosecution's case without calling him to enter defence for a charge under s 409 of the Penal Code ('the PC').

THE CHARGE

[2] The charge against the respondent reads as follows:

> Bahawa kamu, pada 03.04.2014 di pejabat S.T.M Transformers Sdn Bhd Lot 1976, Section 66, Jalan Semangat, Pending Industrial Estate, dalam daerah Kuching dalam negeri Sarawak sebagai salah seorang pengarah syarikat S.T.M Transformers Sdn Bhd dan dalam kapasiti tersebut telah diamanahkan dengan penguasaan ke atas harta tertentu iaitu bayaran pembelian daripada syarikat Wee Success Trading Company sebanyak RM36,953.01 telah melakukan kesalahan pecah amanah jenayah berkaitan harta tersebut berjumlah RM36,953.01 di mana kamu telah dengan curangnya mengarahkan syarikat Wee Success Trading Company membuat bayaran sebanyak RM36,953.01 ke akaun milik kamu sendiri (511038613447 – Maybank Berhad) dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

[3] From the outset learned counsel for the respondent argued that the charge preferred against the respondent is defective as the date of the alleged commission of the offence is stated as 3 April 2014 when the evidence led by the prosecution pointing to a different year ie 3 April 2013. The charge is not amended until the appeal stage although the point was taken up by learned counsel for the respondent in his submission at the end of the prosecution's case. The learned DPP for the appellant argued that the mistake was a typo error and it is curable under s 422 of the Criminal Procedure Code.

[4] In admitting that there was an obvious mistake over the date in the charge, the learned DPP submitted that this court is empowered to amend the charge and applied for the date of the commission of the offence to be amended accordingly from 3 April 2014 to 3 April 2013. She further submitted that the amendment to the charge will not cause the respondent to be retried for the same offence and hence the respondent's plea of autrefois acquit does not apply.

[5] I agree with the learned DPP that the charge if amended will not bring a subsequent criminal proceeding against the respondent which would put him under jeopardy twice for the same offence (*Nadarajan v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications* [1994] 2 MLJ 657).

[6] As submitted by the learned DPP, the main purpose of this appeal is to set aside an order of discharge and acquittal given by the learned magistrate and to call for the respondent to enter defence based on the proposed amended charge to give effect to the evidence led by the prosecution. In any event, the respondent's acquittal was not because of defective charge but based on the learned magistrate's evaluation of the merits of the case. Based on the evidence adduced in the trial court and the learned magistrate's ground of judgment, I find that he had directed his mind on the merits of the charge based on the alleged offence committed on 3 April 2013 despite the date is wrongly stated in the charge. I would proceed to consider the merits of this appeal based on the alleged offence committed by the respondent on the 3 April 2013.

THE APPEAL

[7] The learned DPP submitted that the learned magistrate was fallen into error and misdirected himself in holding that the prosecution had failed to make out a prima facie case for a charge under s 409 of the PC.

[8] It was the appellant's submission that the respondent should be called to enter his defence for the following reasons:

(a) the respondent is an agent of STM Transformers Sdn Bhd ('STM Transformer') as one of its directors;

(b) based on the evidence of the other director of STM Transformer ie Ong Jin Ek ('PW7'), the respondent manages the day to day operation of STM Transformer. Being the director of STM Transformer he is entrusted to collect monies on behalf of STM Transformer from its client. The evidence reveals that the payment of money in the sum of RM36,953.01 from Wee Success Electrical Trading Company ('Wee Success') payable to STM Transformer was made through the respondent. Having entrusted with the said money in question the respondent therefore had the control and with dominion over it; and

(c) based on the evidence of the director of Wee Success ie Spencer Wee Boon Wang ('PW2'), the respondent had called and requested him to prepare and issue a cheque dated 25 March 2013 amounting to RM36,953.01 (exh P1) under the respondent's name. The conduct of the respondent in requesting PW2 to issue exh P1 under his name and later the money was credited into his Maybank Account No 511038613447 on 3 April 2013 (exh P8 at p 110 of the appeal record) constitute an offence of breach of trust.

[9] It was also the appellant's submission that the money should not be credited into the respondent's personal account as it belongs to STM Transformer on business dealing with Wee Success. Whatever reasons offered

by the respondent would not justify the respondent's action in requesting exh P1 to be issued under his name. In doing what he did, the respondent had dishonest intention to misappropriate the said money. The burden is shifted to the respondent to rebut the presumption under s 409B(1)(b)(i) of the PC.

THE FINDINGS OF THE COURT

Whether the respondent had dishonest intention to misappropriate the sum of RM36,953.01 when he credited it into his Maybank account?

[10] In order to prove the charge against the respondent on a maximum evaluation of all the evidence adduced at the end of prosecution's case, the prosecution must establish that the accused had the intention to dishonestly misappropriate RM36,953.01 for his own use.

[11] PW2 testified that it was not unusual for him to issue cheque under the name of the respondent. He further stated that the sum of RM36,953.01 owed by Wee Success to STM Transformer was duly paid. There was no further claim of any pending payment from STM Transformer against Wee Success. PW2's evidence that the amount of RM36,953.01 paid through the respondent and went into the account of STM Transformer are recorded by the trial court as follows:

> Q: How did you know that this particular payment will totally be for S.T.M Transformers Sdn Bhd?
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> A: Because normally if I already pay to Mr. Kao Che Jen this amount for last 2 years, if the S.T.M Transformers Sdn Bhd saying that I still owing them the any money so they will give me a letter or call me for the payment.
>
> If this payment direct to Mr. Kao Che Jen, if Mr. Kao Che Jen not pay direct to S.T.M Transformers Sdn Bhd, the teory of this S.T.M, they will give me a statement or letter or call me for the payment but until now I never receive any credit note or statement from S.T.M that saying that I owing them any money.
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> (p 33 of the appeal record Vol 1/3)

[12] Whilst it is not an issue that the respondent had requested for the issuance of exh P1 to the respondent for purpose of payment to STM Transformer, this fact must be viewed and considered in the light of PW2 further evidence that the respondent did inform him the reasons for such request ie that STM Transformer was in need of money to run the day to day operation and the fact that PW7 had refused to sign certain cheque of STM Transformer.

> Q: When you testify that Mr. Kao Che Jen is requested the payment to made under his name as per check [cheque] as per exhibit P1, do you

agree that, that payment as exhibit P1,Mr Kao Che Jen was receive on behalf of S.T.M Transformers Sdn Bhd ?

A: Yes.

Q: Could you tell the court that this statement of account from S.T.M Transformers Sdn Bhd confirmed receive of 36,953.01?

A: Yes.This one I think last 2 few years invoice.

Q: When Mr. Kao Che Jen make a request for the payment of 36,953.01 to him on behalf of S.T.M Transformers Sdn Bhd ,do you agree did Mr.Kao Che Jen informed you that the other directors in S.T.M Transformers had refuse to sign check [cheque]?

A: Yes.

Q: Did Mr. Kao Che Jen also inform you that he has already advance a lot of money to operate S.T.M Transformers?

A: Yes.

(pp 27–29 of the appeal record Vol 1/3)

[13] It was also suggested to the prosecution's witness that the respondent had consulted STM Transformer's external auditor ie Mr David Wong before requesting for PW2's assistance to issue exh P1 into the respondent's own name on behalf of the company, so that the monies can be used for STM Transformer's daily operation and expenses.

[14] Having scrutinise the prosecution's evidence, I agree with the learned magistrate that there is no intention on the part of the respondent to dishonestly misappropriate the sum of RM36,953.01. The said request by the respondent was accounted for when PW2 testified and informed the court that the respondent did inform him the reason for such request. STM Transformer's account officer ie Madam Liew and its external auditor were aware of the whole episode that they had been consulted and informed prior to the request made by the respondent to PW2.

[15] The fraudulent intention is further thwarted with the production of defence exhibit ie D1 which clearly shown that the money RM36,953.01 that had been credited into the respondent's Maybank account was properly recorded into STM Transformer's statement of account.

[16] Exhibit D1 also shows that there is no more pending payment due from Wee Success. For this reason, I cannot see how the respondent could be said to have intended to dishonestly misappropriated the money when the whole world is aware the reason for his request and at the end of the day the money was accounted for in exh D1.

[17] PW7 being the complainant in this case, had no knowledge about the issuance of cheque exh P1 in 2013, hence he could not support and corroborate the prosecution's case. This can be seen from the evidence of PW7 in cross-examination that he was not aware of the circumstances upon which the said payment of RM36,953.01 was made to STM Transformer through the respondent.

70.

Q: Did you have any idea at all why Wee Success Electrical Trading Company paid the RM36,953.01 to Mr. Kao Che Jen?

A: I have no idea.

71.

Q: And that was also your reason why you did not make a complaint against Mr. Kao Che Jen in respect of RM36,953.01?

A: Yes, I have no idea.

72.

Q: As far as you complaint is concern, you complaint did not state specifically the sum stated in the charge the RM36,953.01, do you agree?

A: Yes because I was not aware.

(pp 93–94 of the appeal record Vol 2/3)

[18] It must be noted that not only that PW7 had no knowledge about the said payment of RM36,953.01 was paid to STM Transformer through the respondent, he also did not consult or enquire from PW2 why the said payment of RM36,953.01 was paid in that manner soon or immediately after he had seen exhs P1 and D1. In his own police report (ID9 pp 113–114 of the appeal record Vol 3/3), the alleged wrongdoing leveled at the respondent was for the periods between 2004–2010 and not the alleged offence in 2013. The relevant evidence taken from PW7 are reproduced below:

81.

Q: Have you ever spoken to Mr. Spencer Wee pertaining to this cheque and the payment about exhibit P1?

A: No.

83.

Q: Did you lodge any police report after exhibit P1 the cheque was cleared and paid into Mr. Kao Che Jen account?

A: I was not aware.

(pp 96–97 of the appeal record Vol 2/3)

Whether failure to call STM Transformer's account officer ie Madam Liew and STM Transformer's external auditor ie Mr David Wong fatal to the prosecution case

[19] During the prosecution case, efence had put to the prosecution's witnesses at the very first instance, the roles of the other important witnesses ie account officer, Madam Liew who issues 'exh D1' and the external auditor, Mr David Wong whom the respondent had sought advice from on how the payment from the client could be used for the daily operation of the STM Transformer. I agree with the learned magistrate that failure to call these two witnesses is fatal to the prosecution case. These two witnesses are readily available as they are the prosecution's own witnesses. Had they been called, they would be able to fill in the gap to rebut the suggestion put up by the defence on the roles played by these two witnesses. In my view this is a proper case to invoke s 114(g) of the Evidence Act 1950 that the evidence if produced would be unfavourable to the prosecution.

Presumption under s 409B(1)(b)(i) of the PC

[20] In the case of *Hj Maamor bin Hj Abdul Manap v Public Prosecutor* [2002] 6 MLJ 668, it was held that before the above presumption can be activated, the prosecution must first prove that the accused had misappropriated the sums of money involved.

[21] In the present case, the prosecution had failed to establish a dishonest intention on the part of the respondent to misappropriate the said money for his personal use based on direct or indirect evidence.

CONCLUSION

[22] On all these consideration, I am of the view that the learned magistrate had directed his mind on maximum evaluation of the evidence and to rule that there is no prima facie case established by the prosecution.

[23] There is no merit in the appellant's appeal and the same ought to be dismissed. The learned magistrate order of acquittal and discharge are affirmed.

Appeal dismissed and magistrate's court's decision affirmed.

Reported by Ashok Kumar